Board in its pending proceeding seeking to have any mail rate for the period after June 1, 1942, fixed tentatively and subject to review (R. 7-11).

On December 16, 1942, the Board issued its opinion and order in which, *inter alia*, it fixed a final mail rate for Capital for the period "on and after June 1, 1942" (*Pennsylvania-Central Airlines Corporation, Mail Rates*, 4 C.A.B. 22, 55). With respect to Capital's request that the rate fixed for the period subsequent to June 1, 1942, be tentative rather than final, the Board's opinion stated 4 C.A.B. 22, 25):

> Since the submission of the case to us for decision reports of the results of operations under the new service pattern have been filed for the months of June, July, August, and September. These results are in the record through stipulation. They afford some basis for judging future results. Accordingly, we shall fix rates herein to become effective June 1, 1942, with the understanding that upon [Capital's] request filed pursuant to rule 8 of the Rules of Practice, they will be subject to reconsideration from and after that date.

Although Rule 8 of the Board's Rules of Practice (Appendix, *infra*, pp. 11-12) provided that a petition for reconsideration had to be filed within 15 days after service of the order sought to be vacated or modified, Capital did not file a petition for reconsideration of the Board's order within such period; nor did Capital seek a timely review of

such order in court pursuant to the provisions of the Act (Section 1006(a), 49 U.S.C. 646(a)).

More than four years after the issuance of the Board's order, Capital filed a document entitled "Petition for Reconsideration * * * and for Further Relief" (R. 11-33) and thereafter a supplement thereto (R. 33-108). The petition requested reconsideration of the Board's order, the entry of an order retroactively increasing its mail rate for the period June 1, 1942, through December 31, 1946, and the entry of an order establishing a new and higher mail rate for the period following January 1, 1947 (R. 20-21). Public Counsel moved to dismiss Capital's petition insofar as it requested the establishment of a mail rate retroactively effective to June 1, 1942 on "policy" grounds (R. 109-119). After Capital filed an answer to this motion (R. 119-130), Public Counsel amended their motion to assert that "once the Board has fixed a final rate for a particular operation, which rate was accepted and has been in effect and unchallenged during a particular period of time, it has no authority to retroactively fix a different rate for the same operation during the same period of time" (R. 130-131).

The Board, one member dissenting, dismissed the petition of Capital insofar as it requested the fixing of a mail rate for a period prior to January 14, 1947 (R. 132-180). Its decision was based on the grounds (1) that Capital's petition of January 14, 1947, initiated a new proceeding rather than

continued the old proceeding (R. 136-138), and (2) that the Board did not have authority to fix a new mail rate to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding[1] (R. 138-161).

Capital applied to the United States Court of Appeals for the District of Columbia Circuit for a review of the Board's order (R. 1-7). That court affirmed the order. It held (1) that the Board's order of December 16, 1942, fixed a final mail rate, subject only to reconsideration if requested within 15 days, which right was lost by failure of Capital to request reconsideration within the given time; (2) that "in view of the finality of the rates, which stood unchallenged for more than three years, the Board was without power to revise them retroactively;" and (3) that "the power to increase retroactively established rates which have prevailed unchallenged is not needed to vindicate the Constitutional requirement for just compensation." (R. 181-182.)

ARGUMENT

1. The basic question presented by this petition —whether the Board is empowered under the Civil Aeronautics Act to fix a new mail rate to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding—was presented in *Transcontinental & Western Air, Inc.*

[1] The dissenting opinion did not disagree with the first of these grounds.

v. *Civil Aeronautics Board,* No. 387, this Term, which this Court now has under consideration. It would be appropriate, therefore, for the Court to defer action on this petition until its decision in the *TWA* case, which will necessarily be controlling as far as the principal question raised by the present petition is concerned.

2. The only different question presented by Capital's petition is whether the Court of Appeals and the Board erred in treating Capital's petition of January 14, 1947, as a new request for increased rates rather than as a reopening of the old case decided in 1942. Capital's contention (Pet. 17) that the Board's 1942 order fixed a temporary or provisional rate is clearly unfounded. What the Board did, in 1942, was to confer on Capital an absolute right to reconsideration within 15 days in addition to its preexisting right, under Rule 8, to petition for reconsideration (R. 137-138). This appears from the opinion of the Board at the time it issued the 1942 order (*supra,* p. 4), and from the fact that, four years later, the Board explicitly stated that "Heretofore we have refused to establish future mail rates on a tentative basis subject to later readjustment." *Essair, Inc., Temporary Mail Rate,* 6 C.A.B. 687, 690.[2] Capital's further contention (Pet. 17-20) that in any event the Board had power to reopen the old proceeding is immaterial

[2] Compare the language of the Board's order in Capital's case (4 C.A.B. at 54-55) with the language of the Board's opinion and order in *Essair, Inc., Temporary Mail Rate,* 6 C.A.B. 687, 690, 691-692 (1946).

because the Board, in the exercise of a sound discretion which the courts are not free to set aside, chose not to do so. See *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 534.

Finally, the nature of the question is not such as to merit review by this Court. The question concerns Capital alone and will not arise again. No important issue of federal law is involved and there is no conflict, from either a substantive or procedural standpoint, between the decision below and that of any other circuit or of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should not be granted at this time, and that it should ultimately be disposed of in accordance with this Court's determination in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* No. 387, this Term.

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APRIL, 1949.

APPENDIX

Section 406 of the Civil Aeronautics Act of 1938, c. 601, 52 Stat. 998, 49 U.S.C. 486, as amended, provides in part:[3]

> (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid

[3] The Act as originally enacted conferred certain functions on the Authority. The functions of the Authority in connection with rates for the transportation by air carriers of persons, property and mail were transferred to the Civil Aeronautics Board by Reorganization Plan No. IV, Sec. 7, which took effect June 30, 1940 (54 Stat. 1235; 5 F.R. 2421). Accordingly, in all references to "Authority" in Section 406(a)-(b), the term "Board" should be substituted.

by the Postmaster General from appropriations for the transportation of mail by aircraft.

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

The regulatory provision involved in this case is Rule 8 of the Board's Rules of Practice (14 C.F.R. (1939 Supp.) § 285.8)), which provides:

Petition for rehearing, reargument, or reconsideration. Any party may petition for rehearing, reargument, or reconsideration of any final order by the Authority in a proceeding, or for further hearing before decision by the Authority.

The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition.

If a final order of the Authority is sought to be vacated or modified by reason of matters which have arisen since the hearing, or of a consequence which would result from a compliance therewith, or both, the new matter, the resulting consequence, or both, which are relied upon by the petitioner must each be set forth in the petition. Where the petition is based wholly or in part upon new matter, the petition must contain a verified statement that the petitioner, with due diligence, could not have known or discovered the new matter prior to the time of the hearing.

The petition must set forth a brief statement of the relief sought by the petitioner.

Such petition for rehearing, reargument, or reconsideration, must be filed within 15 days after service of the order sought to be vacated or modified, and shall be served by the petitioner upon all parties to the proceeding or their attorneys of record.

No petition for rehearing, reargument, or reconsideration, or the granting thereof, filed in accordance with this section, shall operate

as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Authority.

Petitions under this section must conform to the requirements of § 285.3.

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